

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

GEORGE J. CORBETT,	:	
	:	Civil Action No. 05-3429 (WJM)
Petitioner,	:	
	:	
v.	:	<b>OPINION</b>
	:	
RONALD H. CATHEL, et al.,	:	
	:	
Respondents.	:	

**APPEARANCES:**

Petitioner pro se  
George J. Corbett  
New Jersey State Prison  
P.O. Box 861  
Trenton, NJ 08625

Counsel for Respondents  
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**MARTINI**, District Judge

Petitioner George J. Corbett, a prisoner currently confined at New Jersey State Prison, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents are Ronald H. Cathel and the Attorney General of the State of New Jersey.

For the reasons stated herein, the Petition must be denied.

I. BACKGROUND

A. Factual Background

It is undisputed that on September 14, 1994, Petitioner killed Christopher Shrimpton by firing a single .22 calibre rifle bullet into his chest. At the time of the killing, Shrimpton was 14 years old; Petitioner was 20.

The relevant facts are set forth in the opinion of the Superior Court of New Jersey, Appellate Division.<sup>1</sup>

We need not recount the facts at length. The State presented compelling evidence of defendant's guilt. Among other things, the State's proofs disclosed that (1) defendant had twice engaged in criminal conduct with the victim, Chris Shrimpton, (2) that on both occasions Shrimpton had informed the police of defendant's complicity in the crimes, (3) that defendant had repeatedly told others he intended to seek revenge against Shrimpton, (4) that, consistent with these threats, defendant fired a shot into Shrimpton's bedroom, (5) that the subsequent killing of the victim occurred in the presence of nine witnesses, each of whom testified at trial, (6) that defendant fled to New York City immediately after the murder, (7) that upon his arrest defendant told the police where they could find the murder weapon, (8) that the rifle was discovered by the police in the location described by defendant, and (9) that ballistics evidence established the bullet recovered from the victim's body was fired from the rifle. In short, the voluminous record fairly reeks of defendant's guilt.

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<sup>1</sup> Pursuant to 28 U.S.C. § 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

(Re3, Opinion of Appellate Division, at 2-3.)

B. Procedural History

Following a jury trial in the Superior Court of New Jersey, Law Division, Middlesex County, Petitioner was found guilty on April 18, 1996, of murder, N.J.S.A. 2C:11-3a(1) and (2), and possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4a. On May 24, 1996, Petitioner was sentenced to life imprisonment with a thirty-year parole disqualifier. In addition, the trial court imposed a consecutive four year sentence based upon defendant's violation of probation on an unrelated prior conviction.

By Opinion filed February 17, 1999, the Superior Court of New Jersey, Appellate Division affirmed the conviction and sentence. (Re3.) On May 26, 1999, the Supreme Court of New Jersey denied certification. (Re5.)

Petitioner then filed a timely motion for post-conviction relief in the trial court.<sup>2</sup> The trial court denied relief. (Re23.) By Opinion filed November 5, 2004, the Appellate Division affirmed the denial of relief. (Re11.) The Supreme Court of New Jersey denied certification by Order filed January 28, 2005. This Petition followed. Respondents have answered and this matter is now ready for disposition.

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<sup>2</sup> The date that Petitioner filed his motion for post-conviction relief is not revealed in the record supplied to this Court.

II. 28 U.S.C. § 2254

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 now provides, in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

With respect to any claim adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve[s] an

unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and may involve an "unreasonable application" of federal law "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," (although the Supreme Court expressly declined to decide the latter). Id. at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. Id. at 409. In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. Matteo v. Superintendent, 171 F.3d 877, 890 (3d Cir. 1999).

Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference. Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002) (citing Weeks v. Angelone, 528 U.S. 225, 237 (2000)). With respect to claims presented to, but unadjudicated by, the state courts, however, a federal court may exercise pre-AEDPA independent judgment. See Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001); Purnell v. Hendricks, 2000 WL

1523144, \*6 n.4 (D.N.J. 2000). See also Schoenberger v. Russell, 290 F.3d 831, 842 (6th Cir. 2002) (Moore, J., concurring) (and cases discussed therein).

The deference required by § 2254(d) applies without regard to whether the state court cites to Supreme Court or other federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v. Packer, 537 U.S. 3 (2002); Woodford v. Visciotti, 537 U.S. 19 (2002)).

Although a petition for writ of habeas corpus may not be granted if the Petitioner has failed to exhaust his remedies in state court, a petition may be denied on the merits notwithstanding the petitioner's failure to exhaust his state court remedies. See 28 U.S.C. § 2254(b)(2); Lambert v. Blackwell, 387 F.3d 210, 260 n.42 (3d Cir. 2004); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003).

Finally, a pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989);

United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969),  
cert. denied, 399 U.S. 912 (1970).]

### III. ANALYSIS

#### A. Right to Present A Defense

“[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” Homes v. South Carolina, 126 S.Ct. 1727, 1731 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998); also citing Crane v. Kentucky, 476 U.S. 683, 689-690 (1986); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6 (1983); Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973); Spencer v. Texas, 385 U.S. 554, 564 (1967)).

This latitude, however, has limits. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Crane, supra, at 690, 106 S.Ct. 2142 (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” Scheffer, supra, at 308, 118 S.Ct. 1261 (quoting Rock v. Arkansas, 483 U.S. 44, 58, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

...

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed

by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. ... Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Crane, supra, at 689-690, 106 S.Ct. 2142 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); ellipsis and brackets in original). See also Montana v. Egelhoff, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

Homes v. South Carolina, 126 S.Ct. at 1731-33 (citations omitted).

Violations of the right to present a defense are subject to harmless error review. See, e.g., Crane v. Kentucky, 476 U.S. 683 (1986); Delaware v. Van Arsdall, 475 U.S. 673, 680-84 (1986); Savage v. District Attorney of the County of Philadelphia, 116 Fed.Appx. 332 (3d Cir. 2004) (unpubl.).

The Compulsory Process clause protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge. [footnote] ...

But the right is not absolute. The Sixth Amendment requires more than a mere showing by the accused that some relevant evidence was excluded from his trial. Rather, the accused must show how that testimony would have been both material and favorable to his defense. ... [E]vidence is material: "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." ... In [United States v. Bagley, [473 U.S. 667 (1985), ]the Court further refined the materiality definition by noting that, "[a] 'reasonable probability' is a probability sufficient to undermine



confidence in the outcome." Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

In sum, for [a defendant] to establish that he was convicted in violation of his Sixth Amendment right to compulsory process, he must show: First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose. Rock v. Arkansas, 483 U.S. 44, 56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987).

Government of the Virgin Islands v. Mills, 956 F.2d 443, 445-46 (3d Cir. 1992) (footnote omitted). The Court of Appeals noted that some courts analyze such claims under the Due Process Clause and that there is little, if any, difference in the analysis. Mills, 956 F.2d at 445 n.4.

Here, Petitioner alleges three separate deprivations of his right to present a defense: (1) the denial of the right of cross-examination on the issue of bias, as evidenced by an alleged conspiracy to shoot Petitioner, (2) the refusal to order disclosure of a confidential informant who may have had information about the alleged conspiracy to harm Petitioner, and (3) the denial of the request to present demonstrative evidence of Petitioner's left-handedness. Each will be addressed in turn.

Both the claim that Petitioner was deprived of his right of cross-examination and the claim that he should have been given the name of a confidential informant arise out of information received during the trial that suggested that two witnesses might

have been involved in the theft of guns for the purpose of harming Petitioner. (Rel5, Transcript of April 3, 1996, at 211-21; Rel6, Transcript of April 4, 1996, at 118-214.)

The trial court refused to permit defense counsel to impeach the credibility of witnesses Scott Lipinski and Nigel Shrimpton, brother of the victim, by questioning them about their involvement in the alleged conspiracy to shoot Petitioner in court. In addition, the trial court refused to compel disclosure of the identity of a confidential informant involved in the police investigation of the alleged conspiracy. Petitioner contends that these decisions deprived him of his Sixth Amendment right to confront the witnesses against him and of his Fourteenth Amendment right to due process.

Following a hearing during which the court heard testimony from the officers involved in the investigation of the gun theft, the court denied both the request to cross-examine these witnesses on the subject of their involvement in the alleged conspiracy to harm Petitioner and the request for the identity of a confidential informant involved in the investigation.

THE COURT: Leaving aside some of the rhetoric of this, trial courts are confronted yearly today with difficult decisions. Trial courts are sworn to uphold the law. Trial judges take very seriously their responsibility to provide a fair trial to both sides, being the people of the State of New Jersey are entitled to a fair trial and the defendant is entitled to a fair trial. But I suppose if there's a conflict between the two then obviously the rights of the defendant are paramount.

Now, this Court has heard that, in fact, bias is one way that witnesses can be impeached, and counsel has presented to the Court the case of State versus Smith. I think that dates back to 1968. But I think it's good -- still good law. In that case the Appellate Division overturned the trial court's because of the trial court's refusal to permit defendant to cross-examine the State's principal witness on the issue in an attempt to show bias on other -- and also overturned the judge because of other constrictions that the place -- the judge placed upon the defendant's right to present evidence.

But that case, as this case, turns on the facts and anybody who has been in my courtroom more than once knows that the facts weight heavily with me. We can enunciate broad principles and all we want to but we must look at the underlying facts. And State versus Smith we had a -- the State's principal witness was a police detective, and the defendant alleged that that police detective in the process of arresting him for that -- for the crime for which he was on trial beat him up. He beat him up. He took him to a garage. He went up on a lift and beat him up some more.

Now, defendant was permitted to ask the officer about whether he did such a thing and the defendant -- and the police officer, as might be expected, denied it. It was highly unlikely that he was going to say, yeah, I beat him up to this extent or maybe he was going to say that he hit him once or twice because he attempted to escape or whatever they say. But he denied it.

Thereafter the defendant took the stand, talked about the beatings and tried to present extrinsic evidence of his complaints that he made to the police department and I believe to some of the superiors. The -- the hospital records and the judge wouldn't let him make his case, wouldn't let him show the -- that the police officer had bias, and the police -- the judge was wrong in that case and clearly wrong in that case.

Please know, and for the benefit of any reviewing court, the facts in this case nowhere near approach the facts in State versus Smith. The facts in this case are that -- and again I -- I am not going to -- I am not going to find as the finder of fact because I'm

not truly the finder of fact in this case, the jury is. But starting with the -- with the proposition of -- that I'm not going to find the facts, that the jury will eventually.

Suffice it to say, there have been a number of witnesses, approximately nine or ten witnesses who testified to seeing the defendant shoot Chris Shrimpton, a fourteen year old boy, in the heart with a single shot .22 caliber rifle. Now, I don't have any problem if the jury wants to decide that the State hasn't met its burden in showing that first element of the offense that George [Corbett] didn't shoot him, but it looks to this Court that there is sufficient evidence at this juncture for the jury to find that element that, in fact, the defendant shot [Chris] Shrimpton on September 14th of 1994.

Now, the issue that has presumably been joined between the parties -- and I don't mean to speak for the parties, but the Court sat and listened to the opening statements and might reasonably be assumed that the issue did the defendant know what he was doing? And did he intend the consequences of his acts when he did it?

And to that end the State has presented a number of witnesses who spoke about a feud between the victim and the defendant. The victim is alleged to have I think that the vernacular word is ratted him out. That is told the police or that -- that the defendant was implicated in some car burglaries and that the defendant took umbrage with that. I make no findings of fact about whether the defendant did, in fact, participate in those -- those car burglaries. It is totally irrelevant.

The only reason they were admitted was on the issue of the defendant's intent and motivation because numerous witnesses testified that, in fact, Mr. Corbett had expressed his unhappiness with the victim and that at some time he indicated that he would like to do him harm.

Now, Nigel Shrimpton the defendant's brother testified and a relative of the victim I suppose is -- comes before the Court with some fair inference of bias. To begin with he's the victim's older brother.

He's the one who lives in the household where his brother is gone. He's the one who shares his mother's anguish or at -- is at least subject to it over this time.

So without having said a word of cross -- without being conducted a word of cross-examination, defense counsel could very, very well stand up and argue before this Court to disregard the testimony of Nigel Shrimpton. Look where he's coming from. He's the defendant's brother. The defense counsel did a more than adequate job of cross-examining Mr. Shrimpton. Defense counsel pointed out inconsistencies in Mr. Shrimpton's sworn statement to the Old Bridge police taken within hours of the shooting.

Mr. Kenny, as I said, was given an opportunity to ask the -- the witness whether, in fact, he had any bias. Did he like George? Isn't it a fact that he like to see the defendant suffer for what he did and et cetera, et cetera. I don't recall him asking those specific questions but he certainly had the opportunity to do that.

If Nigel Shrimpton's testimony is to be distinguished from anybody else's testimony it was in the area where he indicated that he had a conversation with the defendant within a short time prior to the shooting, and by a short time I would have to go back and look at my notes, but within an hour or so of -- of this shooting when Nigel is alleged to have said something to the defendant about you know what's the deal with my brother? Or why don't you make up or call this quits? And the defendant is alleged to have responded is your brother's life worth six months? Implying that he might have to do six months in jail.

Now, that testimony is unique. It's the only testimony that's unique. That is, unique to Mr. Shrimpton. And it may be that -- it may be that the jury is going to focus in on -- on that testimony to the exclusion of all of the others, and that may be the crucial bit of testimony that would incline the jury to convict. I don't think so.

But what I want to put on the record is that Nigel Shrimpton is not the State's key witness in this case. He is not the one who is holding the -- the defendant

hostage in this regard because he is the one who can identify him as the shooter, anything of that nature. It's not there.

Now, conceding the defendant's right to cross-examine on the issue of bias, the defendant must have a good faith basis in that regard, and I don't think I have to cite case law on the matter. I can. But I think that that's patently clear to both sides. The defendant says, yes, I have a good faith basis because of what was told to me by the Court that Detective McGovern who is the investigating officer in this case passed on to the Court a concern that the Court be aware that there -- there were initially two guns and that turns out not to be true. They appear that the Old Bridge police always knew where the one gun was because it was turned over by the mother of the boy who had it.

So the information I got in that regard was not entirely true, that there were two guns floating around out there. But he told me that there [were] two guns out there, not to worry because the guns have now been recovered, but that -- because I took notes from Detective McGovern when he read it. That initially the guns were taken from a police officer in Jersey City. Scott Lipinski either turn the guns over to the police department or Scott Lipinski told the police officer where the guns were and that Nigel Shrimpton's name was mentioned, that they did receive one gun from Scott Lipinski, and one gun was obtained from another juvenile and that this investigation started from information contained on the street.

Detective McGovern also said in response to my question, no one has been arrested at this time and there are no admissions made by anyone. I asked the question because I thought if there were admissions or there was a statement defense counsel might have the right to know about it. I mean depending upon what it said.

I was very aware that this could involve this trial in some way. I was very aware that it could somehow effect the security of this court. I immediately shared with counsel my concerns. I must say that all of us were a little lighthearted about that at -- at that time. It was sort of -- you know --

this conspiracy theory, maybe they are going to bring the guns into court, maybe there is going to be a shootout and things like that.

But it was not until defense counsel indicated that he wished to question Scott Lipinski on the stand about this that I stopped counsel for the reason that Scott Lipinski was sixteen years of age and should not be asked under oath whether, in fact, he engaged in any crimes without having his parents here and without being informed fully of his right to remain silent, his right to counsel, his right to be informed of any charges against him. So, I stopped that right -- right at the onset and I did indicate that I would have a hearing, and we indeed did conduct such a hearing today, and I did hear the testimony of Detective ... John Doherty, a member of the Old Bridge Police Department who was the investigating officer in this matter. He did confirm that there was a theft of two weapons from the Jersey City police officer and that occurred on March 30th of 1996, and [how] Old Bridge Police Department came to know of the -- of the theft is that they received a telephone call from -- from a woman, a citizen Diana -- Diane -- ... Diauto. And Ms. Diauto indicated that her son David had a gun in his room. That gun had been turned over to her by her nine year old son. ... The police questioned her son.

The police also spoke to the boy's father who is apparently either divorced or separated from his mother and living with I could say fellow officer but living with a woman officer, and it was actually the woman officer who was in -- who was the owner of -- of -- of the guns.

The sixteen year old son David was -- was questioned on Monday, that on tape under oath and it was, in fact, transcribed. David was asked about the second gun that was stolen, the .25 caliber gun and David said that he believed the gun was with Scott Lipinski, that he sold it to Scott Lipinski for the amount of ninety dollars.

Subsequently Scott was questioned, said that he took it out and to the area near Duhernal Lake, fired two shots from it and then somehow passed it on, whether it was -- it was sold or just turned over for nothing, I don't know, but it was turned over to a

white male, long brown hair, age approximately twenty to twenty-five, and the testimony before the Court is that the police eventually recovered the gun because they had a confidential informant. Apparently somebody who knows all of the actors who knows these young people down in Old Bridge, and the confidential informant said that he could get the gun.

I heard the testimony of Detective Charles Miller who has had a relationship with this confidential informant. The confidential informant -- well, I believe that it was David who was asked who might have the gun. Names were mentioned. Nigel Shrimpton, Scott and the confidential informant's name was mentioned. The confidential informant eventually got -- recovered the gun, turned it over to the police officers, and the police officers at this point say that their investigation is essentially completed except for the making of some reports.

I do understand that Mr. Kenny ... thinks that the police could have gone out and done a more in depth investigation not to recover the weapons, not to determine their whereabouts but to determine whether, in fact, Nigel and Scott ever -- well, we know Scott had possession of it. But did Nigel have possession of it? Did Nigel want possession of the gun and if, in fact, Nigel wanted possession of that gun not to rob Nicola's pizzeria but to bring it into court to assault the defendant in this court?

Well, it might be interesting to know. I'm not sure about how one goes about getting that information if that's something that is known only to Scott and -- and Nigel. I do recognize that police officers consistent with the constitution are limited in getting confessions of crimes. I suppose they could go out and ask them whether, in fact, they are engaged in a conspiracy to commit murder. After having given them their rights I do recognize that Scott Lipinski is sixteen and -- and Mr. Shrimpton, Nigel Shrimpton is eighteen years of age.

I am satisfied at this stage that there has not been a sufficient showing for this Court to direct Old Bridge police officers to do further investigations because I'm not sure of what investigations I should order them to do. I'm not a trained detective. I -- I



suppose I could tell them to go speak to Nigel or to back to the confidential informant and -- or go back to Scott recognizing they've already spoken to Scott, and there's some question about whether Scott has been entirely forthcoming with them.

But true -- in truth I'm not sure of the Court's authority in this matter, and I'm at this point not satisfied that a sufficient showing has been made that I can supersede the department, order further investigation, because, as I said, I don't know what investigation might prove fruitful.

I went -- understand the difficulty of proving the negative in this case. Proving that there was no conspiracy. I can't imagine that the officers could ever present enough evidence to satisfy the defendant that there was no possibility whatsoever that there was any conspiracy, any intent to harm -- to harm the client, and I don't know what the police officers can do.

So, while I can appreciate defense counsel, I think from perhaps an opportunity to bring the [witnesses] back to question them about any possible bias in that regard might have slipped through their fingers. I can't find that that in any way jeopardizing the defendant's right to a fair trial in this regard.

I make this statement at length for the review of any Appellate Court. I defer to -- to the wisdom of some judges who are not in the difficult position that this Court is in of trying to make this decision during a trial such as this, because this Court has long thought long and hard about the ramifications of my decision and the possibilities of trying to impeach a juvenile witness or even an adult witness by questioning them about a serious crime that they may have committed without having -- giving them access to counsel and seeing whether they wish to avail themselves of their Fifth Amendment rights. And I'm not sure where we're going with this case. I'm satisfied at this point that a thorough investigation has been done by the Old Bridge Police Department and to what they were going to investigate. I will go no further.

Mr. Kenny, I leave you to whatever resources you have.

...

MR. KENNY: Yes. ... I also do wish to supplement the record, however, that when we spoke on Tuesday morning the Court had informed us in addition to what you had stated on the record that the word on the street was at least as you understood it and explained it to us was that the purpose for which Scott Lipinski and Nigel wanted to get these guns related to this court and my client and that's what prompted the -- the discussion about increased security.

We had the sheriff's officers increased security. In fact, you had given a direction to the prosecutor to see if they could get one of their investigators to be in the hallway while the kids were there and make sure they were [not] in the bathroom too long nothing was passing and exchanging weapons and things like that for the securities of all of us which made good common sense. But that was the knowledge that I had at the time when I sought to do my examination.

The knowledge that we have has been supplemented today in this 104 hearing which is why we saw the two detectives who have come. The knowledge is a little bit different than that we have, but in light of what the Court has found the facts to be insufficient because of the state of the investigation. ...

But what was not investigated was whether or not Nigel and -- and Lipinski -- Nigel Shrimpton and Scott Lipinski were involved at all in an effort to have those guns for the purpose of what Sergeant McGovern originally thought they might be trying to get the guns for, and therefore what I am asking this Court to do is two things.

I am asking this Court to have the detectives, number one, if they know the name or can obtain the name of this mystery person who had possession of the gun after Scott Lipinski and who evidently gave the gun to the confidential informant, to give that name to me, to you, to someone, and if there is a reason why they don't at least tell us what the reason why they don't want to give us that name is, if it's another

confidential informant on the record can be clear that that's why we're not getting it.

Some sort of that first request is that they give the name of the confidential informant so that at least what resources I have available to me we can do what investigation we can if the police aren't going to do it to see if he can uncover any evidence that would be sufficient to again present to the Court what new information we have in an effort to try to prove the bias or whatever might come out as a result of that investigation.

Second to that, I am informing the Court is that we were only informed of this and the detectives will confirm that this series of events happened this weekend, and Monday of this week and Tuesday was the day ... the trial was really to start in earnest and openings and the taking of testimony, which is what happened.

I am at a terrible disadvantage. If that information is out there and hasn't yet been uncovered because it hasn't been fully explored and investigated it is to the prejudice of my client. Therefore I am asking the Court for the appropriate amount of time to allow me to see, number one, if I can get an investigator, and, number two, to get an investigator out there to follow up these leads.

THE COURT: If you are asking me to adjourn this trial and to delay the trial for an indefinite period of time while you go out and try and quote investigate this -- this lead the answer is no. I mean you have the weekend. Tomorrow is Good Friday. We are off. You have Friday, Saturday, Sunday. ... [T]his trial is going to continue on Tuesday morning.

...

MR. KENNY: Is your Honor going to indicate whether or not they are going to give me the name of the confidential informant? And if they are going to have the confidential informant give the name to them of the person, the mystery person who had the gun in between Scott Lipinski and the confidential informant?

THE COURT: What is the position of the police department, Detective Miller?

DETECTIVE MILLER: I'm sorry.

THE COURT: What is the position? There has been a request for the name of the confidential informant.

DETECTIVE MILLER: I would wish not to reveal it.

THE COURT: I'm sorry.

DETECTIVE MILLER: I wish not to reveal who it is.

THE COURT: Do you have any concerns for the confidential informant's safety?

DETECTIVE MILLER: Sure I do. That is why I don't want to reveal who it is.

THE COURT: Is the confidential informant an adult or a juvenile? Can you tell me that?

DETECTIVE MILLER: I believe he is an adult. I believe he is an adult.

THE COURT: Without a showing of need at this point I'm not going to direct the Old Bridge Police Department to turn over the name of their confidential informant. I think that the confidential informant has provided the police with a valuable service. He's been useful in the past. They have some concern for his safety and I'm not going to order them to turn it over.

(Re16, Transcript of April 4, 1996, at 195-214.) The record does not reflect that Petitioner's counsel returned to the court with any further request to cross-examine based on his own investigation.

The Appellate Division denied these claims without comment.

(Re3 at 2, 11.)

1. Cross-Examination as to Bias

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."

Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (emphasis in original). The Supreme Court has recognized that:

"the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Savis, Supra, at 316-317, 94 S.Ct., at 1110 (citing Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original).

Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986). "[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis." Van Arsdall, 475 U.S. at 684.

Here, the trial court knew only that one of the two witnesses as to whom Petitioner sought cross-examination on bias

had had possession of a stolen gun for a few hours before he passed it on to an unknown person and that the word "on the street" was that the two witnesses, including the victim's brother, wanted the gun to use it against Petitioner.

Undoubtedly, evidence that the two witnesses harbored sufficient ill will towards Petitioner to want to seriously injure or kill him may have influenced the jury's determination of the credibility of these two witnesses. As the court noted, however, Nigel Shrimpton's credibility already was subject to challenge based upon his relationship to the victim. Nevertheless, the only "evidence" of the alleged murder conspiracy was rumor and the fact that one witness had possession of a stolen gun for a few hours before he disposed of it. In the face of such scant evidence, and the fact that the witnesses would have had to be advised of their right to remain silent as to the alleged conspiracy, it was not error for the trial court to decline to permit the defense to inject this issue into the trial.

Moreover, any error that may have occurred clearly was harmless. Here, there were numerous witnesses as to Petitioner's behavior during the evening, when he left the company of his friends at his home, and at the basketball court where he killed the victim. With the exception of the testimony about Petitioner's question whether the victim's life was worth six months, the testimony of the two witnesses was cumulative. Petitioner had four days to

investigate the alleged conspiracy and did not return to the trial court with any additional information. There is not a reasonable likelihood that the excluded testimony affected the outcome of the trial. Petitioner is not entitled to relief on this claim.

2. Confidential Informant

The U.S. Supreme Court has recognized a limited "informer's privilege."

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. ... The purpose of the privilege is in furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

...

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

...

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro v. United States, 353 U.S. 53, 59-62 (1957) (citations and footnotes omitted). See also McCray v. Illinois, 386 U.S. 300, 311 (1967).

Thus, "the first step in determining whether the identity of an informant must be disclosed is to ascertain what need, if any, the defendant has alleged for disclosure. The burden is on the defendant to show the need for disclosure." United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981), cert. denied, 455 U.S. 923 (1982) (citations omitted). "The mere speculation that an eyewitness may have some evidence helpful to defendant's case is not sufficient to show the specific need required by Roviaro." Jiles, 658 F.2d at 197 (citations omitted). Once a defendant establishes a specific need for disclosure, the Roviaro balancing test comes into play.

When applying this test, one of three types of cases may emerge. ... First, the court may be presented with an extreme situation, such as that in Roviaro itself, in which the informant played an active and crucial role in the events underlying the defendant's potential criminal liability. In these cases, disclosure and production of the informant will



in all likelihood be required to ensure a fair trial. At the other end of the spectrum, are the cases in which the informant was not an active participant or eyewitness, but rather a mere tipster. In such cases, courts have generally held that the informant's identity need not be disclosed. A third group of cases falls between these two extremes and it is in this group that the balancing becomes most difficult.

Jiles, 658 F.2d at 196-97 (citations omitted).

Here, Petitioner sought the identity of the confidential informant in order to determine the identity of the person from whom the informant had obtained the stolen gun. Although Scott Lipinski told police that he gave the gun to a stranger, Petitioner's counsel argued that that was not a credible report, and speculated that Lipinski might have given the gun to Nigel Shrimpton or some other youth in their circle who could provide information on the reason that Lipinski had obtained the gun. Again, the purpose for seeking information about the intended use for the gun was solely to attack the credibility of Scott Lipinski and Nigel Shrimpton. Thus, this is not a situation in which the confidential informant has any direct information as to the guilt or innocence of the defendant in a criminal action. Instead, this situation involves speculation as to the knowledge of the informant regarding matters relevant only to the credibility of two eyewitnesses in a case involving numerous eyewitnesses. Although the evidence for concealing the informant's identity on the basis of danger was slight, this is not a case where refusal to order disclosure deprived Petitioner

of a fair trial. As noted above, for the most part, the evidence given by Scott Lipinski and Nigel Shrimpton was cumulative, and Nigel Shrimpton's credibility already was subject to challenge based upon his relationship to the victim. The state courts' determinations that Petitioner had failed to establish grounds for disclosure sufficient to overcome the state's assertion of danger are neither contrary to nor an unreasonable application of clearly established federal law, nor are the state courts' decisions based on an unreasonable determination of the facts in light of the evidence presented. Cf. United States v. Saa, 859 F.2d 1067, 1073 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989) and 498 U.S. 870 (1990) (the fact that an informant might cast doubt on the general credibility of a government witness normally is an insufficient basis to overcome the informer's privilege). Petitioner is not entitled to relief on this claim.

### 3. Demonstrative Evidence

The testimony of the prosecution witnesses established that Petitioner had been holding the gun in his right hand when he fired it. The trial court rejected Petitioner's request to sign his name in front of the jury, without being sworn or subjecting himself to cross-examination, for the purpose of demonstrating that he was left-handed and, thus, had not intentionally shot the victim with the gun held in his right hand. The trial court held that the demonstration was testimonial and therefore denied

Petitioner permission to make the demonstration. (Rel9, Transcript of April 11, 1996, at 123-38; Re21, Transcript of April 16, 1996, at 12-14.)

Petitioner contends that he was deprived of his right to due process by the trial court's refusal to permit him to demonstrate his left-handedness before the jury without being subject to cross-examination. The Superior Court of New Jersey, Appellate Division, rejected this argument on direct appeal.

We skip to defendant's third argument - that the trial court erred by barring him from engaging in a demonstration. This contention is advanced against the backdrop of the following facts. The State's witnesses testified that defendant used only his right arm in firing the rifle. Evidence indicated that such a movement would be difficult because of the weight, shape and size of the firearm. Defendant wanted to demonstrate to the jury that he was left-handed by providing a writing sample which could be compared with his signature on various court documents. However, defendant did not want to be cross-examined and thus elected not to testify. The trial court excluded the proposed demonstration, reasoning that defendants' preparation of a writing sample in the presence of the jury would qualify as a "testimonial" act inconsistent with his decision to invoke the Fifth Amendment privilege by not taking the stand.

Defendant's argument must be considered within the context of the historical roots from which the privilege against self-incrimination had its genesis. The Fifth Amendment privilege developed "as a reaction to the practice in the early English courts of compelling a witness to be sworn and give testimony concerning his guilt or innocence." State v. King, 44 N.J. 346, 357 (1965); see also Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485, 486-90 (1957). In the light of this history, text writers and the overwhelming majority of the courts have written that the Fifth Amendment privilege is not

implicated where the accused is placed in a lineup, or fingerprinted, or photographed, or examined for bodily characteristics, or compelled to provide a writing sample. See, e.g., Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1975); State v. Cary, 49 N.J. 343 (1967); State v. Blair, 45 N.J. 43 (1965).

Nevertheless, communicative behavior by an accused at trial may be considered "testimonial" notwithstanding the defendant's refusal to take the stand. For example, in State v. Fioravanti, 46 N.J. 109 (1965), cert. denied, 384 U.S. 919, 86 S.Ct. 1365, 16 L.Ed.2d 440 (1966), our Supreme Court held that a demonstration by the accused, who had not taken the stand, constituted "testimonial" evidence, thereby waiving the prohibition against judicial and prosecutorial comment pertaining to the failure to testify. At the conclusion of the case the defendant donned a pair of trousers allegedly taken from him during the crime and walked before the jury. In his summation defense counsel argued that the pants could not have belonged to the accused because they did not fit. In his instructions to the jury the trial judge commented on defendant's failure to take the stand. On appeal, defendant argued that the trial court's comments contravened the principles mandated in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).[fn omitted]

Our Supreme Court held that the demonstration was "testimonial" in nature, principally because it sought to rebut portions of the State's proofs. Noting that "one can communicate by gesture as effectively as by word," the Court found that defendant had "chose[n] to communicate with the jury." State v. Fioravanti, 46 N.J. at 119. The Court went on to state that "[i]t would distort the truth-finding process to expect the jurors to weigh what the defendant chooses to reveal and to be oblivious of his silence as to the remainder." Id. at 118. Citing Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917), the Court concluded that "when a defendant chooses to speak as to only a part of the direct proof against him" it may be inferred that "he is unable to dispute the balance." State v. Fioravanti, 46 N.J. at 118. That Fioravanti "chose a technique whereby he

succeeded in avoiding cross-examination," was said not to preclude the judge and the prosecutor from commenting upon his failure to answer or rebut the state's proofs. Id. at 119; see also State v. Schultz, 46 N.J. 254, 258, cert. denied, 384 U.S. 918, 86 S.Ct. 1367, 16 L.Ed.2d 439 (1966); State v. Bontempo, 170 N.J. Super. 220, 244 (Law Div. 1979).

Fioravanti was decided twenty-four years ago. Perhaps it is questionable whether the Court's holding has any force of law today. We can envision circumstances under which strict application of Fioravanti might seem unfair. For example, were a defendant to demonstrate that a glove left at the scene of a crime does not fit his hand, could it be said that the accused has waived his Fifth Amendment privilege, thus subjecting him to comment on his failure to take the stand? So too, were a defendant to stand before the jury to show that his physical dimensions are inconsistent with a victim's description of the culprit, would such a demonstration constitute "testimonial" conduct, thereby constituting a waiver of the accused's right to remain silent?

We, of course, mean no disrespect to our Supreme Court. We merely stress that these are difficult questions, and we do not know how the Court would decide them today. Fortunately, we need not explore the continued vitality of Fioravanti or, for that matter, its outermost parameters. Assuming that the trial court erred by barring defendant from engaging in the proposed demonstration, we find that the error so committed was harmless beyond a reasonable doubt. Undoubtedly, there were other ways in which the defense could have shown that defendant was left-handed. Beyond this, we conclude that exclusion of the proposed demonstration did not have the capacity to lead to an unjust result. R. 2:10-2. The entire episode represents only a few lines in a voluminous transcript brimming with compelling evidence of defendant's guilt. We are entirely satisfied that the demonstration, if permitted, would not have changed the jury's verdict.

(Re3, Opinion of Appellate Division, at 7-11.)

In applying the Self-Incrimination Clause of the Fifth Amendment, the Supreme Court has recognized a controlling distinction between real or physical

evidence obtained from a defendant's person and that which is testimonial. The Court has upheld action by the state compelling an accused to submit to blood tests, Schmerber v. California, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908; to try on clothing, Holt v. United States, 1910, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, and to exhibit his person for observation, United States v. Wade, 1967, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149. In addition, the Court has cited with approval cases holding that the privilege against self-incrimination 'offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' United States v. Wade, *supra*, at 223, 87 S.Ct. at 1930, quoting from Schmerber v. California, *supra*, 384 U.S. at 764, 86 S.Ct. at 1826.

Mitchell v. Pinto, 438 F.2d 814, 816-17 (3d Cir. 1970) (en banc), cert. denied, 402 U.S. 961 (1971). Thus, where the Self-Incrimination Clause would not preclude compulsion to provide real or physical evidence that is not testimonial or communicative, a defendant can provide such evidence voluntarily in a demonstration at trial, without that conduct being analogized to testimony and constituting a waiver of the privilege against testifying. Id.<sup>3</sup>

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<sup>3</sup> Only two years earlier, the Court of Appeals for the Third Circuit had held that it was a testimonial act for a defendant to don a pair of trousers, known to have been worn during the commission of the crime, for the purpose of establishing that they were substantially too large to be his. See Fioravanti v. Yeager, 404 F.2d 675 (1968). The Court of Appeals specifically noted that, to the extent the Mitchell rationale was inconsistent with its own prior decision, the reasoning of the Fioravanti opinion will not be followed.

Had Petitioner sought only to produce a handwriting exemplar, that act clearly would not have been testimonial and would have been permitted. See, e.g., Gilbert v. California, 388 U.S. at 266-67; United States v. Wade, 388 U.S. at 222-23; Matter of Special Federal Grand Jury Empanelled Oct. 31, 1985, 809 F.2d. 1023 (3d Cir. 1987). Here, however, Petitioner's proffer went far beyond the provision of a handwriting exemplar for identification purposes. Here, Petitioner sought to write his signature in front of the jury for the purpose of demonstrating his left-handedness not in handwriting, but in other activities, including the aiming and firing of a rifle. This proffer was testimonial. Petitioner sought to be free from cross-examination as to his left-handedness in the activity and intent at issue in the trial. The trial court did not err in excluding this demonstration as testimonial.

To the extent the trial court did err, the Appellate Division correctly found the error harmless. Petitioner could have introduced evidence of his left-handedness through other witnesses. Moreover, numerous witnesses saw Petitioner point and shoot the rifle. Cf. Sarauer v. Frank, 2005 WL 1075617 \*10-11 (W.D. Wis. May 5, 2005) (refusal to permit defendant to present photographic evidence without subjecting himself to wide-open cross-examination was subject to harmless error analysis).

The state court decisions are neither contrary to nor an unreasonable application of clearly established federal law. Nor are they based on an unreasonable determination of the facts. Petitioner is not entitled to relief on this claim.

B. Ineffective Assistance of Trial Counsel

Petitioner complains that he received ineffective assistance of trial counsel based upon counsel's (1) failure to present an intoxication defense, (2) failure properly to confront witnesses T. Swiecicki and S. Menits with their inconsistent statements to police, (3) conflict of interest due to his law firm's prior representation of police officers and township officials.

The conflict-of-interest claim was raised on direct appeal and rejected by the Appellate Division.

We first address defendant's claim that he was denied the effective assistance of counsel because his trial attorney's law firm had represented Detective Thomas Collow, a prosecution witness, in an unrelated civil suit some four years before the trial. It is undisputed that trial counsel did not participate in the prior civil action in any way, and that defendant was made aware of the relevant facts and had no objection. We add that Detective Collow's role in the trial was extremely minimal. The detective testified that he and another officer arrested defendant in New York City and that he witnessed defendant prepare a map showing where the murder weapon could be found. Collow's testimony was entirely cumulative, Detective Robert McGovern having recounted in detail the circumstances surrounding defendant's arrest and preparation of the map.

We summarize the applicable principles. It is axiomatic that both the Federal and New Jersey Constitutions afford an accused the right to have the untrammelled and unimpaired assistance of counsel. See



Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680, 699 (1942); State v. Bellucci, 81 N.J. 531, 538 (1980); State v. Land, 73 N.J. 24, 29-30 (1977); State v. Gren, 129 N.J. Super. 157, 161 (App. Div. 1974); State v. Ebinger, 97 N.J. Super. 23, 27 (App. Div. 1967). These constitutional prescriptions mandate that a defendant should have nothing less than the undivided loyalty of his attorney. Glasser v. United States, 315 U.S. at 70, 62 S.Ct. at 465, 86 L.Ed. at 699; State v. Bellucci, 81 N.J. at 538; State v. Land, 73 N.J. at 29-30. In an unbroken line of decisions, both federal and state courts have said that the attorney's position as an advocate for his client should not be compromised before, during or after trial. Von Moltke v. Gillies, 332 U.S. 708, 720-21, 68 S.Ct. 316, 322, 92 L.Ed. 309, 319 (1947); Williams v. Kaiser, 323 U.S. 471, 475, 65 S.Ct. 363, 366, 89 L.Ed. 398, 402 (1945); State v. Bellucci, 81 N.J. at 538; State v. Land, 73 N.J. at 31.

Most of the decisions pertaining to this subject have involved dual representation by a lawyer or a law firm. The following rules have been developed. If a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of co-defendants, a per se conflict arises and prejudice will be presumed absent a valid waiver. State v. Norman, 151 N.J. 5, 24-25 (1997). Otherwise, the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown to establish constitutionally defective representation. Id. at 25 (citing State v. Bell, 90 N.J. 163, 171 (1982)).

Somewhat different principles apply where the law firm of a defendant's trial counsel has previously represented a prosecution witness. Our Supreme Court has addressed the issue in two decisions. In State v. Galati, 64 N.J. 572 (1974), a police officer was indicted for criminal offenses. The Law Division granted the State's motion to disqualify the defendant's lawyer, who was regularly retained by the same local police benevolent association that defendant belonged to, because other police officers who were to be called as prosecution witnesses were also members of the association. The Supreme Court granted leave to appeal and reversed the trial judge's order. Id. at 578-79.

However, the Court adopted a rule to be applied in future cases disqualifying the association's lawyer. Id. at 578-79. The Court noted that when the association's lawyer "undertakes the representation of a private cause in which a member of that same [association] is destined to testify (on one side or another) there is bound to occur a public suspicion that the [association] witness will be inclined to palliate or vivify his testimony in order to accommodate the lawyer who, outside the courtroom, is en rapport with and supportive of the private and organizational interest of the [association] witness." Id. at 576. The Court said that "[t]he doubts thus engendered or suspicions aroused ... impoverish the appearance of justice and taint the image of law and its even-handed enforcement." Ibid.; see also State v. Morelli, 152 N.J. Super. 67, 70 (App. Div. 1977); State v. Needham, 298 N.J. Super. 100, 103 (Law Div. 1996); State v. Catanoso, 222 N.J. Super. 641, 644 (Law Div. 1987).

More recently, the Court rendered its decision in State v. Purnell, 126 N.J. 518 (1992). There, the Court addressed issues similar to those raised here. The law firm of defendant's trial counsel had previously represented a prosecution witness on a drug offense. As here, the defense argued that because the firm's interests would prohibit defendant's lawyers from sharply cross-examining the firm's former client, the trial counsel's interest would be materially adverse to that of the accused. Id. at 535. The Court was not persuaded by this contention. Emphasizing that the prior drug case was wholly unrelated to that of the defendant, the Court concluded that the defense attorney was not forced to choose between betraying his former client or compromising his duty to vigorously defend against the criminal charges. Ibid. The Court also stressed that the defendant had consented in open court to counsel's continued representation. Id. at 536.

The facts here parallel those in Purnell. Nothing in the record suggests that defense counsel was prevented from serving as a vigorous partisan of defendant's interests. See State v. Bellucci, 81 N.J. at 541. The attorney-client relationship between counsel's law firm and Detective Collow was not a continuing one. Defense counsel had no interest to

curry favor with Collow or to betray his duty to defendant by not cross-examining the witness uninhibitedly. Moreover, as we pointed out, Collow played a minor role in the trial. His testimony was cumulative and added little or nothing to the State's case. And finally, defendant was apprised of the relevant facts and consented to defense counsel's continued representation. There is no suggestion that he was deceived or coerced into consenting. We perceive no violation of defendant's right to the effective assistance of counsel under these circumstances.

(Re3, Opinion of Appellate Division, at 3-7.)

Petitioner's other claims were rejected by the Appellate Division on appeal from the denial of post-conviction relief.

In order to establish a prima facie case of ineffective assistance of counsel, a defendant must: (1) demonstrate that counsel's performance was so deficient that he "was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) establish that the attorney's deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, 446 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); see also State v. Fritz, 105 N.J. 42 (1987) (adopting the Strickland standard in New Jersey). A prima facie claim of ineffective assistance of counsel requires defendant to allege facts sufficient to demonstrate counsel's alleged substandard performance. State v. Cummings, 321 N.J. Super. 154, 168-69 (App. Div.), certif. denied, 162 N.J. 199 (1999). Mere naked assertions are insufficient to establish a prima facie claim. Ibid.

Defendant argues that trial counsel failed to make an intoxication defense and failed to conduct a reasonable cross-examination of critical witnesses. Alternatively, he maintains that the cumulative effect of the ineffective assistance at trial resulted in the imposition of an unjust sentence.

Defendant's claim that counsel failed to pursue an intoxication defense is belied by the record. Witnesses testified that defendant had been drinking,

and counsel, in summation, argued that defendant's drinking precluded him from having the requisite mental state to commit murder.

Furthermore, defendant asserts that trial counsel did not fully investigate the case, and was therefore ineffective, because he did not subpoena the register tapes from the store where the defendant purchased alcohol. However, "when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or person making the certification." Cummings, supra, 321 N.J. Super. at 170. Here, defendant has made no showing of what information would have been obtained had trial counsel subpoenaed the register tapes.

Defendant also claims that counsel failed to effectively cross-examine Thomas Swiecicki and Stephen Henits. Specifically, defendant argues that counsel failed to question Swiecicki about the differences between the statements Swiecicki gave to police and his testimony at trial, and that counsel failed to challenge Henits's characterization of how the rifle was used, namely whether defendant pointed or aimed the rifle at victim.

Swiecicki told police that he did not see the shooting. In his statement to police he said that he was sitting on the bleachers at the basketball court when he heard a pop and then heard Chris's body hit the ground. At trial Swiecicki again testified on direct that he "heard a pop from the gun." The only difference between the two statements is that in speaking with the police Swiecicki stated that defendant ran into the woods, while at trial Swiecicki stated that defendant rode off down the street on a bike. However, defendant does not take issue with this. Rather, defendant claims that Swiecicki told police that he did not witness the shooting and then testified at trial that he did. The record does not support defendant's claim. Swiecicki at all times maintained that he did not see the shooting, but heard the shot and saw defendant fleeing the scene. Thus, defendant cannot show that trial counsel's performance was deficient or that defendant was in any way prejudiced.

Similarly, Henits's testimony is consistent with that given by all of the boys at the basketball court the night of the murder. None of the witnesses discussed whether defendant pointed or aimed the rifle at the victim. They all stated, as Henits did, that defendant rode up on a bicycle, fired one shot at the victim, and left the scene. There is no support for a claim of ineffective assistance of counsel.

(Rell, Appellate Division Opinion of November 5, 2004, at 3-6.)

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel is "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that his counsel's performance fell below an objective standard of reasonable professional assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland at 694. Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that,

absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 697.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. If counsel has been deficient in any way, however, the habeas court must determine whether the cumulative effect of counsel's errors prejudiced the defendant within the meaning of Strickland. See Berryman v. Morton, 100 F.3d 1089, 1101-02 (3d Cir. 1996).

Cuyler v. Sullivan, 446 U.S. 335, 346-50 (1980), establishes the test for evaluating a conflict of interest claim.<sup>4</sup> Pursuant

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<sup>4</sup> Although Cuyler involved a conflict of interest claim arising out of an attorney representing both the defendant and co-defendants, the test is the same in a claim that the conflict arising from a defense attorney's firm's prior representation of a state's witness. See, e.g., Government of Virgin Islands v.

to Cuyler, a trial court is obliged to investigate any timely objections to multiple representation; if the trial court permits the defendant to show that the conflict will result in an unfair trial, a reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. If the defendant raised no objection at trial, he establishes a constitutional violation only if he shows that an actual conflict of interest adversely affected his lawyer's performance. A defendant who shows that a conflict of interest actually affected the adequacy of counsel's representation need not demonstrate prejudice. Id.; see also Mickens v. Taylor, 535 U.S. 162 (2002).

The Appellate Division's determination that there was no ineffective assistance based upon counsel's firm's prior representation of one witness, who played a minor role and whose testimony was cumulative, is not contrary to or an unreasonable application of the Cuyler rule. Cf. Purnell, 2005 WL 1523144 at \*10-11. Petitioner is not entitled to relief on this claim.

With respect to Petitioner's other claims of ineffective assistance, the decision of the Appellate Division was neither contrary to, nor an unreasonable application of, clearly established federal law as set forth in Strickland, nor was it based on an unreasonable determination of the facts in light of

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Zepp, 748 F.2d 125, 135 (3d Cir. 1984); Purnell v. Hendricks, 2000 WL 1523144 \*10, n.10 (D.N.J. Oct. 16, 2000).

the evidence presented. Petitioner is not entitled to relief on these claims.

C. Jury Instructions<sup>5</sup>

Generally, a jury instruction that is inconsistent with state law does not merit federal habeas relief. Where a federal habeas petitioner challenges jury instructions given in a state criminal proceeding,

[t]he only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. In addition, in reviewing an ambiguous instruction ..., we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly." "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citations omitted). Thus, the Due Process Clause is violated only where "the erroneous instructions have operated to lift the burden of

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<sup>5</sup> Respondents contend that the jury instruction claims are not exhausted because they were not framed in federal constitutional terms before the state courts. To the contrary, Petitioner clearly asserted these claims in federal constitutional terms before both the Appellate Division and the Supreme Court of New Jersey. See Rel, Appellate Division Brief of Petitioner at 18, 26; Re4, Letter-Petition on Behalf of Petitioner before Supreme Court of New Jersey, at 11, 18. Accordingly, this Court will address the jury instruction claims on the merits.



proof on an essential element of an offense as defined by state law." Smith v. Horn, 120 F.3d 400, 416 (1997). See also In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (jury instructions that suggest a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused).

Where such a constitutional error has occurred, it generally is subject to "harmless error" analysis. Smith v. Horn, 120 F.3d at 416-17; Neder v. United States, 527 U.S. 1, 8-11 (1999). "[I]f the [federal habeas] court concludes from the record that the error had a 'substantial and injurious effect or influence' on the verdict, or if it is in 'grave doubt' whether that is so, the error cannot be deemed harmless." Id. at 418 (citing California v. Roy, 519 U.S. 2, 5 (1996)). In evaluating a challenged instruction,

a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.

Middleton v. McNeil, 541 U.S. 433, 437 (2004) (internal quotations and citations omitted).

However, a jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden [of proof beyond a reasonable doubt] is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972). "[T]rial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." Victor v. Nebraska, 511 U.S. 1, 22 (1994); see also Cage v. Louisiana, 498 U.S. 39, 41 (1990). As the Supreme Court explained in Victor,

so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.

Victor, 511 U.S. at 6 (citations and internal quotation marks omitted).

"[A] misdescription of the burden of proof ... vitiates all the jury's findings. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original). Such an error is considered structural and thus is not subject to harmless error review. See id. at 280-82. But see Neder v. United States, 527 U.S. 1, 8-11 (1999) (applying harmless-error analysis where jury was not instructed on an element of an offense).

1. Failure to charge passion/provocation homicide

At trial, some evidence was presented that the victim had, on the evening he was killed, tried to goad Petitioner into a fight. One witness described the victim as "real pissed off" and said that "[h]e wanted to fight George and he wanted to get it over with and finish fighting him or something." (Rel5 at 36, 115-16, 250.) The victim rode his bike to Petitioner's house and challenged Petitioner to fight him. Petitioner did not respond and the victim's brother Nigel told him to leave. (Rel4 at 92-95; Rel5 at 36, 73,; Rel6 at 10-11, 25-26.) At the victim's behest, two or three more times that evening, the victim's friend Eddie Wright went to Petitioner's house to tell him that the victim wanted to fight; each time, Petitioner indicated that he was not interested. (Rel4 at 96; Rel5 at 37-44, 74, 115, 178-79, 196-97, 250-51; Rel6 at 10-12, 26-27, Rel7 at 57.) Fifteen to 20 minutes after Wright's last visit, Petitioner announced that he was going to the store and left on his bike. (Rel5 at 96-97; Rel5 at 197-201; Rel6 at 12-13, 27; Rel7 at 57-58.) Instead of going to the store, he went to a basketball court, where the victim was hanging out with his friends, and shot him.

Petitioner specifically declined to request a jury charge on passion/provocation manslaughter. (Re21 at 29-30.) Petitioner now contends that the trial court should have given such a charge

anyway. The Appellate Division rejected this claim without opinion.

In Beck v. Alabama, 447 U.S. 625, 635 (1980), the Supreme Court held that, in a capital case, a trial court must give a requested charge on a lesser included offense where it is supported by the evidence. The Court left open the question of whether instructions on lesser included offenses were required in non-capital cases. Id. The Court of Appeals for the Third Circuit has held that trial courts must charge a lesser included offense so that the jury does not convict a defendant of a crime more serious than the jury believes the defendant actually committed merely because the jury believes the defendant had some degree of involvement and does not want to set the defendant free. Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988) (citing Keeble v. United States, 412 U.S. 205, 212-13 (1973)). But see Geschwendt v. Ryan, 967 F.2d 877, 884 n.13 (3d Cir.) (observing that the Supreme Court, in Schad v. Arizona, 501 U.S. 624 (1991), cast doubt on the theory that due process requires the court to instruct on a lesser included offense in non-capital offenses), cert. denied, 506 U.S. 977 (1992). Other circuits have held that the failure to give lesser included offense instructions in a non-capital case does not present a constitutional question. See Pitts v. Lockhart, 911 F.2d 109,

112 (8th Cir. 1990), cert. denied, 501 U.S. 1253 (1991); Bonner v. Henderson, 517 F.2d 135, 136 (5th Cir. 1975).

Under New Jersey law, an instruction as to a lesser offense is warranted where the facts provide a rational basis for such a conviction. N.J.S.A. 2C:1-8e ("The court shall not charge the jury with respect to a lesser included offense unless there is a rational basis for a verdict convicting the defendant of the included offense."); State v. Choice, 98 N.J. 295, 298-99 (1985). However, a charge on a lesser included offense should not be given where it would invite the jury to engage in sheer speculation. State v. Mendez, 252 N.J. Super. 155, 159 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992).

This Court observes that the states are free to define criminal offenses in any way they see fit, within certain constitutional limitations, even through their lower courts. Smith v. Horn, 120 F.3d 400, 415 (1997) (citing Johnson v. Rosemeyer, 117 F.3d 104 (3d Cir. 1997)), cert. denied, 522 U.S. 1109 (1998). Here, state law defines passion/provocation manslaughter as a "[h]omicide which would otherwise be murder under section 2C:11-3 [that] is committed in the heat of passion resulting from a reasonable provocation." See State v. Grunow, 102 N.J. 133, 138-40 (1986); N.J.S.A. 2C:11-4b(2) . The test for passion/provocation is an objective one. State v. Mauricio, 117 N.J. 402, 411 (1990); see also State v. Pratt, 226 N.J. Super.

307, 317 (App. Div. 1988). There are four elements necessary to demonstrate passion/provocation manslaughter: 1) adequate provocation; 2) lack of time to cool off between provocation and slaying; 3) defendant must have actually been provoked; and, 4) defendant must not have actually cooled off before the slaying. The provocation must be sufficient to arouse the passions of an ordinary person beyond the power of his control. State v. King, 37 N.J. 285, 301-02 (1962). However, "a course of ill-treatment" rather than a single event can constitute adequate provocation. State v. Guido, 40 N.J. 191, 211 (1963).

The decision not to give a passion/provocation instruction did not deprive petitioner of a fair trial. Under New Jersey law, words alone do not constitute adequate provocation to reduce murder to manslaughter. See, e.g., State v. Mauricio, 117 N.J. at 413; State v. Crisantos, 102 N.J. 265, 274 (1986); State v. Bonano, 59 N.J. 515, 524 (1971); State v. Ruscingno, 217 N.J. Super. 467, 472 (App. Div.), certif. denied, 108 N.J. 210 (1987). In addition, an instruction on passion/provocation manslaughter would have been contrary to the defense strategy of intoxication and recklessness. As the refusal to instruct on passion/provocation manslaughter conformed to state law, there was no due process deprivation. Petitioner is not entitled to relief on this claim.

2. Failure to give a proper "flight" charge

The trial court gave, essentially, the model charge on "flight."

There has always been testimony in this case from which you may infer that the defendant George Corbett fled shortly after the alleged commission of the crime. The question of whether the defendant fled after the commission of the crime is another fact, another question of fact for your determination. I tell you that mere departure from a place where a crime has been committed does not constitute flight. If you find that the defendant fearing an accusation or arrest would be made against him on the charge involved in the indictment that he took flight -- strike that, that he took refuge in flight for the purpose of evading the accusation arrest on that charge then you may consider such flight in connection with all of the other evidence in this case as an indication or proof of consciousness of guilt. Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving the scene was to evade accusation or arrest for the offense charged in the indictment. It is for you as judges of the facts to decide whether in fact that evidence of flight shows a consciousness of guilt and it is for you as judges of the facts to determine the weight to be given to that evidence in light of all of the other evidence in the case.

(Re22, Transcript of April 17, 1996, at 12-13.) Petitioner contends that the court's instruction suggests that a finding of flight may be proof of a consciousness of guilt only of murder, as opposed to a lesser offense of aggravated or reckless manslaughter. The Appellate Division rejected this claim without opinion.

Whether the instruction is correct under state law, there is no error so great as to have deprived Petitioner of a fair trial.

The instruction on flight did nothing to shift the burden of proof. Petitioner is not entitled to relief on this claim.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. No certificate of appealability shall issue.

V. CONCLUSION

For the reasons set forth above, the Petition must be denied. An appropriate order follows.

s/William J. Martini

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William J. Martini  
United States District Judge

Dated: 8/22/06